No. 15,805

United States Court of Appeals

For the Ninth Circuit

MAGNOLIA MOTOR & LOGGING CO.,
a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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vs.

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Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Sections 641 and 1361 of Title 18, United States Code, and Sections 1291 and 1294 (1) of Title 28, United States Code.

STATEMENT OF FACTS.

1. Evidence offered at the trial proved that the corporation acted through other agents as well as co-defendant, R. Drew Lamb.

2. Township 11 North and Township 12 North, Range 3 East, Humboldt Base and Meridian did not have a common boundary line according to the official records of the Bureau of Land Management.

STATUTES.

18 U.S.C. 641:

> "Whoever embezzles, steals, purloins, or knowingly converts to his own use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States . . . shall be fined not more than $10,000, or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000, or imprisoned not more than one year, or both."

18 U.S.C. 1361:

> "Whoever wilfully injures or commits any depredation against any property of the United States, or of any department or agency thereof . . . If the damage to such property exceeds the sum of $100, by a fine of not more than $10,000, or imprisonment for not more than ten years or both; if the damage to such property does not exceed the sum of $100, by a fine of not more than $1,000 or by imprisonment for not more than one year, or both."

QUESTIONS PRESENTED.

1. Is the conviction of the corporation consistent with the evidence?

2. Did the District Court err in denying defendants' Motion to Dismiss the Indictment charging violations of Title 18, United States Code, Sections 641 and 1361?

3. Was the conviction of the appellant under the Indictment charging violations of Title 18, United States Code, Sections 641 and 1361, a violation of the Fifth Amendment to the Constitution of the United States?

4. Are the verdict and judgment supported by the evidence?

5. Was the District Court's instruction that the land now known as Township 11½ North, Range 3 East, Humboldt Base and Meridian, is and was the property of the United States during the periods of time charged in the Indictment proper?

SUMMARY OF ARGUMENT.

I. The Conviction of the Corporation Is Consistent With the Evidence.

The record and the law abundantly support the conviction of appellant.

II. The District Court Was Not in Error in Denying Defendants' Motion to Dismiss the Indictment Charging Violations of Title 18, United States Code, Sections 641 and 1361.

The District Court's opinion in *United States v. Lamb,* (D.C.N.D., Cal. N.D., 1957) 150 F. Supp. 310, properly disposed of this issue.

III. The Conviction of the Appellant Under the Indictment Charging Violations of Title 18, United States Code, Sections 641 and 1361, Is Not a Viola-

tion of the Fifth Amendment to the Constitution of the United States.

There is no real issue of deprivation of due process under the Constitution.

IV. The Verdict and Judgment Are Supported by the Evidence.

A corporation can be convicted of the crimes charged. The evidence shows that the corporation had the necessary criminal intent.

V. The District Court's Instruction That the Land Now Known as Township 11½ North, Range 3 East, Humboldt Base and Meridian, Is and Was the Property of the United States During the Periods of Time Charged in the Indictment Was Proper.

There is no real issue of violation of the *ex post facto* prohibitions of the Constitution of the United States. The District Court properly took judicial notice of the government's ownership of the unsurveyed area. The appellant waived its right to object to the instruction by not exercising that right at the prescribed time.

I.

THE CONVICTION OF THE CORPORATION IS CONSISTENT WITH THE EVIDENCE.

The contention of the appellant herein is that there is gross inconsistency between the conviction of the corporation and the acquittal of the co-defendant, R. Drew Lamb, on the basis that R. Drew Lamb was the sole acting officer and/or agent of the corporation,

Magnolia Motor and Logging Company. The issue, therefore, is whether or not under the law of the land the conviction of the corporation is consistent with the evidence.

That the conviction of the corporation is proper is indicated by the opinion of District Judge Hulen in *United States v. St. Louis Dairy Co., et al.,* (D.C.E.D. Mo. E.D., 1948) 79 F. Supp. 12, 19, (rev'd on other grounds, *sub nom., Pevely Dairy Co. v. United States,* 178 F.2d 363) wherein it is stated:

> "As we understand the law for the purpose of determining legal liability and responsibility a corporation has an existence separate and apart from that of the persons constituting its officers and agents and it may be guilty of violations of law apart and separate from the guilt or innocence of its officers. In this case the jury were informed in substance that in determining the guilt or innocence of the corporate defendants they should look to the acts done and declarations made by the corporate officers, agents and employees, and that a corporation is bound by and legally responsible in a criminal case for acts performed or things done by an officer, agent or employee of the corporation when such officer, agent or employee is acting within the scope of his authority and the acts of such officer, agent or employee are performed for the corporation employing him and are the duties delegated to him. See New York Cent. H. R. R. Co. v. United States, 212 U.S. 481, 29 S.Ct. 304, 53 L.Ed. 613; and Egan v. United States, 8 Cir., 137 F.2d 369, loc. cit. 379. The guilt or innocence of the corporate defendants was a jury issue of fact."

In the case at bar, the guilt or innocence of the Magnolia Motor and Logging Company was submitted to the jury as a question of fact. Thus, since the jury had an opportunity to hear the facts of the case, the Court of Appeals should be concerned only with the issue of whether or not the conviction of the corporate defendant herein is consistent with the evidence.

In *American Medical Association v. United States,* (C.A. D.C., 1942) 130 F.2d 233, 252, 253, it is stated as follows:

> "Appellants contend that the verdict of the jury acquitting all the defendants except the American Medical Association and the Medical Society of the District of Columbia, and convicting the two latter associations, constitutes such inconsistency as to require that the verdicts of guilty be set aside. *It has been held many times that inconsistency in verdicts does not require the result contended for by appellants. And this is true even though the inconsistency can be explained by no rational considerations. The question for us is whether the convictions are consistent with the evidence.* . . .
>
> "Appellants' contention confuses the concepts of corporate and individual criminal liability. When a corporation is guilty of crime, it is because of a corporate act, a corporate intent; in short, corporate commission of crime. The fact that a corporation can act only by human agents is immaterial. *How separate is the identity of the corporate person and the individual person, where criminal liability is concerned, is shown by the fact that a corporation may be found*

guilty of a crime, the essential element of which is a specific criminal intent. . . ." (Italics added)

Further, as stated in *United States v. General Motors Corporation, et al.,* (7th Cir., 1941) 121 F.2d 376, 411:

"The question on review should not be whether the verdict against the corporation is consistent with the acquittal of the individuals. *Rather it should be whether the conviction is consistent with the evidence.* In other words, we believe that the acquittal of the officers and agents, even if they had been the only persons through whom the corporations could have acted, should not operate without more to set aside the verdict against the corporations. Nor do we attach significance to the argument that the problem of inconsistent verdict in the instant case presents a different problem than when the verdicts upon two counts are inconsistent. See Dunn v. United States, 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 356, 80 A.L.R. 161; United States v. Meltzer, 7 Cir., 100 F.2d 739, 741. In fact we believe that the same rule is applicable, that consistency in a verdict is not required, and that the language in the Austin-Bagley case supra tends in that very direction.

"In any event it is conceded that although a corporation acts only through its agents, their indictment is not a condition precedent to prosecution against the corporation. The appellants insist, however, that in this case the individual defendants did in fact exhaust the list of agents and officers who could have been responsible for the acts and policies of the corporation, and that

hence 'their acquittal must mean that no agent acted unlawfully in behalf of the appellants.' On this phase of the matter, the following observations are relevant. The loss of the individual defendants was not fatal to the indictment as it charges that there were other persons to the grand jurors unknown who participated in the conspiracy. And at the trial it developed that the unnamed co-conspirators included a large number of officers and agents in addition to those named, who were also responsible for the acts and policies of the corporations convicted. It is apparent, therefore, that the acquittal did not exhaust the list of agents who could have been and were responsible for the acts and policies of the appellants.

"In substance the appellants seek to make a case for setting aside the verdict on what appears to be either jury mistake or jury leniency operating to their advantage. We hold that the Court's action in denying the motion for a new trial was proper and lay safely within the boundaries of sound judicial discretion." (Italics added)

The appellant has cited at page 11 of its Opening Brief the case of *Pevely Dairy Co. v. United States,* (8th Cir., 1949) 178 F.2d 363, for the proposition:

"The verdict of guilty as to the corporation is stripped of all semblance of logic and reason and does away with the presumption of correctness usually attributed to the verdict of a jury."

The *Pevely* case concerned an indictment and conviction of two corporate defendants for violation of the Sherman Act relative to fixing of milk prices in the

St. Louis area. Six individual defendants, officers and employees of the companies concerned, were acquitted while the two corporate defendants were convicted. The court held that the evidence, which was circumstantial, was insufficient to show a conspiracy between the defendants and in addition found that the government's evidence was as consistent with the defendants' innocence as with their guilt. The primary basis for the decision was that the evidence did not establish the guilt of *either* the individual or the corporate defendants. On the contrary, in the case at bar the record abundantly supports the verdict against the corporation which acted through a number of its employees and/or agents, not only R. Drew Lamb. It is further pointed out that the salient issue is, as stated in the *Pevely* case, supra at 370:

> ". . . whether the verdict of guilty as against the corporations is sustained by substantial evidence, and mere inconsistency in verdicts is not fatal. . . ."

Appellee agrees with the proposition as stated at page 12 of appellant's Opening Brief, that a reviewing court must be extraordinarily careful to scrutinize the record to ascertain any prejudicial error. For that proposition the appellant has cited the case of *Manley v. United States,* (6th Cir., 1956) 238 F.2d 221. In the *Manley* case the defendant was accused of several violations on different counts. He was convicted on two counts and acquitted on one. In cross-examining the defendant, the government attorney brought out that the defendant had been fired from previous em-

ployment for the reason that his accounts were short. The court held this to be reversible error on the ground that only a previous conviction can be used to impeach. But the court pointed out that the inconsistency of verdicts "alone would not justify reversal." There is nothing in the *Manley* or the *Pevely Dairy* cases which is material to the instant appeal or which would "compel this Court . . . to set aside and reverse the verdict of guilty." (Appellant's Opening Brief, page 12).

There is no doubt that R. Drew Lamb was the principal officer and agent of the corporation. Nevertheless, there is also no doubt that other employees of Magnolia Motor and Logging Company were actively engaged in the theft and depredation of the property of the United States. The statements of various witnesses stood uncontradicted that Ritchie and Wallace were hired to cut and remove timber (Tr. 587, 863, 1369); that Lynn Colby was an employee of Magnolia with the duty of sending the logs down the river from Pecwan to the Paragon Mill (Tr. 1497); that Magnolia paid the fallers, buckers, loggers and employees involved in the operations at Pecwan (Tr. 767, 1279-1280); that both Ritchie and Wallace were instructed to log throughout the unsurveyed area (Tr. 672, 870); that in the presence of Lamb a Mr. Ryerson pointed out approximately the unsurveyed area in 1951 at the Pecwan Tract (Tr. 584); that Mr. Ritchie had cut timber at the tract (Tr. 588); that a map similar to Plaintiff's Exhibit 27 was hanging on the wall of Ritchie's cabin at Pecwan and was used practically

every day in the logging operation (Tr. 590, 591, 861-862, 1318, 1320, 1398, 1505, 1515-1516); that Mr. Ritchie admitted logging in the unsurveyed strip (Tr. 648); that Mr. Ritchie and Mr. Lamb discussed the Hammond, Jenson and Wallen report while Ritchie was working for Magnolia (Tr. 651-652); that Mr. Wallace discussed the unsurveyed area with Lamb and had a copy of Plaintiff's Exhibit 27 at Pecwan and used it (Tr. 861-862); that Wallace was ordered to take the logs out of the unsurveyed area (Tr. 870). It is uncontradicted that Ritchie, Wallace and Colby were employees of the corporate defendant, Magnolia, as indicated by the above record and at pages 10 and 11 of appellant's Opening Brief. It is beyond question that under the law, an agent as lowly in the corporate structure as a salesman or logger can hold the corporate employer guilty of a criminal offense. *United States v. George F. Fish, Inc., et al.,* (2nd Cir., 1946) 154 F.2d 798. See also 19 C.J.S., Corporations, §1362. As stated in the *Fish* case, *supra,* at 801:

> "The corporate defendant makes a separate contention that the guilt of its salesman is not to be attributed to it. But the Supreme Court has long ago determined that the corporation may be held criminally liable for the acts of an agent within the scope of his employment, New York Cent. & H. R. R. Co. v. United States, 212 U.S. 481, 29 S.Ct. 304, 53 L.Ed. 613; and the state and lower federal courts have been consistent in their application of that doctrine . . ."

Therefore, it is respectfully submitted that the prosecution herein has sustained the burden of proof

under the facts and the law with relation to the conviction of the corporate defendant, Magnolia Motor and Logging Company, and that the conviction is consistent with the evidence.

II.

THE DISTRICT COURT WAS NOT IN ERROR IN DENYING DEFENDANTS' MOTION TO DISMISS THE INDICTMENT CHARGING VIOLATIONS OF TITLE 18, UNITED STATES CODE, SECTIONS 641 AND 1361.

The appellant herein has insisted throughout that the grand jury erroneously indicted appellant and its co-defendant, R. Drew Lamb, under improper provisions of the Criminal Code. They were indicted under Title 18, United States Code, Section 641 and Title 18, United States Code, Section 1361. Section 641 pertains to theft of Government property and Section 1361 pertains in essence to wilful injury or depredation against property of the United States. Under each of the statutes, where the value of the property involved exceeds $100, the proper procedure is by indictment rather than by information, since value is the basis for determining the application of either indictment or information.

The District Court has adequately disposed of the argument herein that prosecution should have been by way of information as distinct from indictment. *United States v. Lamb,* (D.C.N.D., Cal. N.D., 1957) 150 F. Supp. 310. Judge Halbert also carefully analyzed the rules concerning the construction to be

utilized where two statutory provisions apply to the same set of facts and concluded at page 312 that:

> ". . . it is an equally well established rule of construction that where two statutes, each proscribing some conduct not covered by the other, overlap, a single act might violate both, at least where there is some distinction between the elements of each offense, and the violator may be prosecuted under either. United States v. Beacon Brass Co., 344 U.S. 43, 73 S.Ct. 77, 97 L.Ed. 61; United States v. Gilliland, 312 U.S. 86, 61 S.Ct. 518, 85 L.Ed. 598; Toliver v. United States, 9 Cir., 224 F.2d 742; and United States v. Moran, 2 Cir., 236 F.2d 361."

The appellant has consistently sought to convert the indictment to a charge of theft of realty rather than one of theft of personalty as actually charged in the indictment. As stated by Judge Halbert in *United States v. Lamb, supra* at 313:

> "By Count I of the Indictment presently before the Court, defendants are charged with knowingly, wilfully and unlawfully stealing and converting to their own use personal property of the United States. The personal property alleged to have been stolen and converted is described in the Indictment as being approximately 10,300 fir, cedar and hemlock logs with an aggregate value in excess of $100. There is no allegation in the Indictment that these logs were growing, standing, or in fact even upon any public or Indian lands, at the time of the alleged offense. On a motion to dismiss an Indictment on the ground that it fails to state facts sufficient to constitute an offense against the United States, this Court

is bound to accept as true all well pleaded facts set forth in the Indictment. Winslow v. United States, 9 Cir., 216 F. 2d 912, 913 and cases therein cited; United States v. Chrysler Corporation, etc., 9 Cir., 180 F.2d 557; United States v. Pennell, D.C., 144 F. Supp. 320. What the government will be able to prove at a trial is one thing, but what is charged in the Indictment is quite another. It is only the latter with which the Court is now concerned on a motion to dismiss.

"It is the opinion of the Court that from the facts pleaded in the instant Indictment, all of the elements necessary to constitute a violation of §641 are presented thereby. Furthermore, the Court is of the view that there is a sufficient distinction between the conduct proscribed by §§1852 and 1853, and that proscribed by §641 to negate any intention on the part of Congress to make §§1852 and 1853 the sole sections applicable to timber, and this is particularly true when the timber has been transmuted from real property into personal property (that is, standing trees to logs or lumber).

"Section 641 applies only to the stealing or conversion of personalty belonging to the United States, whereas §1852 becomes applicable when the act of cutting, destroying or removing *timber growing on the public lands of the United States* is committed, and §1853 becomes applicable when the act of cutting, injuring or destroying *trees growing, standing or being upon any public or Indian lands* is committed. It is fundamental that standing timber (This Court can see no legal distinction between growing trees and standing timber.) is classified as realty, United States v. Sho-

shone Tribe of Indians, 304 U.S. 111, 58 S.Ct. 794, 82 L.Ed. 1213, and Capoeman v. United States, D.C., 110 F. Supp. 924; hence §641 (relating to personalty) could not be applied. In addition, §§1852 and 1853 apply to timber or trees on public land or Indian lands only, whereas §641 has no such limitation. Furthermore, in order to establish a violation of §641, the theft or conversion must be shown to have been committed with a criminal intent, or *'mens rea'*, i.e., with the knowledge that the taking is wrongful, Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288; whereas, the only intent necessary to establish a 'removal' or taking of timber under §1852 is the intent to 'export or dispose of the same', cf. Teller v. United States, 8 Cir., 113 F. 273, construing an earlier and slightly different statute, and §1853 does not appear to require any *specific* intent at all. It is apparent that where §1852 overlaps §641, i.e., when it applies to severed timber (personalty) and the removal thereof, United States v. Schuler, 27 Fed. Cas. p. 978, No. 16,234, it does not require all the attributes of criminal intent, indeed, the intent need not be wrongful at all. A similar legal situation seems to exist so far as §1853 is concerned, although the possibility of such a situation is less clear since §1853 is definitely limited to cutting, injuring or destroying trees. With the aforementioned points of difference in mind, the Court is of the view that Congress did not intend to preclude the application of the general larceny statute, §641, where the taking of logs is involved, and that where the facts justify it, a prosecution under §641 is equally as proper (perhaps even more so in some instances) as one under §1852 or §1853. . . ."

Appellant relies upon the case of *United States v. Simpson,* D.C., Ore., Cr. No. 17,903, to show that an indictment under Section 641 is improper. It is submitted that this case was adequately distinguished by Judge Halbert in *United States v. Lamb, supra,* at 314, footnote 2.

Appellant, at page 15 of its Opening Brief, states:

> "From the earliest federal cases involving the cutting of standing timber on government land, the indictments have been charged under sections similar to Title 18 U.S.C.A. 1852 and 1853. See Bligh [sic] v. United States, 3 Fed. Cases 1581; U.S. v. Darton, 25 Fed. Cases 14919; Teller v. U.S., 113 Fed. 273; Shiver v. U.S., 159 U.S. 491."

In the *Bly* case, *supra,* the United States sued civilly to recover the value of logs cut from the public lands and also brought criminal charges against some of the trespassers. The Court held that the government may proceed both civilly and criminally "and judgment in one form of remedy is no bar to the prosecution of the other remedy." The criminal statute involved was Revised Statute 2461, which bears some similarity to Section 1852, Title 18, United States Code. In *United States v. Darton, supra,* the defendant was indicted for cutting timber on government land. The principal question discussed by the Court concerned intent. The action was brought under a statute which bears some similarity to Title 18, United States Code, Section 1852, but neither that case nor the *Bly* case has any bearing on the exclusiveness of that statute to the circumstances in the

case at bar. In *Teller v. United States, supra,* the defendant was charged with cutting timber from government land. The Court instructed the jury that the intentional cutting of timber on lands known to be part of the public domain constituted a violation of the law. As in the case at bar, the defendant sought to rely upon attempts to inquire at a government office if the land had been surveyed. The Court said, *supra* at pages 277-278:

> "The principles hereinbefore discussed are, we think, entirely applicable to this last contention. The land was unquestionably unsurveyed public land, and, if defendant had prosecuted his alleged honest purpose far enough, he would have ascertained that fact. But whether he knew or could have known that it was unsurveyed public land was immaterial. All he was required to know was that it was public land, surveyed or unsurveyed, and, if he knew that,—which unquestionably he did,—the fact that he endeavored to find out whether it was surveyed or not was quite immaterial; and certainly the toleration of a trespass for three weeks—or for any time, for that matter —by a special agent of the government, whose duty it was not to tolerate it at all, can be of no avail to a trespasser by way of showing that his trespassing was done with an honest purpose."

In addition at page 15 of Appellant's Brief *Shiver v. United States, supra,* is cited. In the *Shiver* case the defendant entered the land for a homestead. Before patent, he cut, removed and sold trees to his employer, and was charged and convicted of a violation of R.S. 2461. That case in no way conflicts with

the opinion of Judge Halbert in *Lamb v. United States, supra.* In addition, there is called to the attention of the Court the unreported case of *United States v. Dausey Leaton Woodruff,* (N.D.N.D., Cal. 1957) Cr. No. 11,950, wherein the defendant was convicted of a violation of Section 641 under similar circumstances.

Count One of the Indictment specified that approximately 10,300 fir, cedar and hemlock *logs* of a value of more than $100 had been stolen and converted by the defendants. The prosecution proved beyond any doubt that approximately 10,000 logs were removed and that the approximate value of the logs converted and stolen amounted to $25,800 (Tr. 426, 536, 540).

Further, it is to be noted that although appellant nominally appeals from its conviction under 18 U.S.C.A. §1361, no argument was made in its Opening Brief on this issue. It is therefore clear that there is no basis for claiming its conviction thereunder was improper. The record amply supports the conviction under this section.

It is respectfully submitted that there is no basis for reversing the conviction of appellant on the ground that prosecution should have been had under the provisions of Title 18, United States Code, Sections 1852 and 1853, rather than under the felony provisions of Sections 641 and 1361.

III.

THE CONVICTION OF APPELLANT UNDER THE INDICTMENT CHARGING VIOLATIONS OF TITLE 18, UNITED STATES CODE, SECTIONS 641 AND 1361, IS NOT A VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The appellant has argued at pages 16-17 of its Opening Brief that:

> "It is a violation of due process as protected by the 5th amendment to the Constitution of the United States to charge and convict under a specific set of facts, the violation of which is either a misdemeanor or a felony, and the choice of the statute used to bring in an indictment is left to the whim of the prosecuting authorities. There cannot be different degrees of penalty for different persons for the same criminal act—this is a violation of the equal protection clause of the Constitution. (Green v. United States, 236 Fed. 2d 708, 712.)"

The *Green* case concerned a defendant who was convicted of a crime of second degree murder under an Indictment charging first degree murder. On the appeal the conviction was reversed and upon remand, he was found guilty of first degree murder. The Court of Appeals held that this did not constitute double jeopardy. On appeal to the Supreme Court the decision was reversed (355 U.S. 184, 78 S.Ct. 221, 2 L.Ed. 2d 199 (1957)). However, there is no issue of double jeopardy in the case at bar, and, therefore, the *Green* case is clearly irrelevant.

Appellant then quotes extensively at page 17 of its Opening Brief from the case of *Berra v. United*

States, 351 U.S. 131, 76 S.Ct. 685, 100 L.Ed. 1013, (1956). The Court's attention is called to the fact that the quotation consists of a portion of the dissent. The majority opinion held that the trial court properly instructed the jury that it could convict for a lesser included crime. As stated by the majority, 351 U.S. *supra* at 135:

> "Whatever other questions might have been raised as to the validity of petitioner's conviction and sentence, because of the assumed overlapping of §§145(b) and 3616(a), were questions of law for the court. No such questions are presented here."

It is further pointed out that even the position of Justice Black in the *Berra* case does not apply to the instant case, where the acts charged are not the same under Sections 641 as under 1852. That there is no issue of constitutional due process in this case is clear from the opinion of Judge Halbert in *United States v. Lamb, supra,* wherein the application of the relevant statutes are discussed.

IV.

THE VERDICT AND JUDGMENT ARE SUPPORTED BY THE EVIDENCE.

It is beyond question that a corporation can be guilty of the crimes with which appellant was charged. The argument of appellant is that because R. Drew Lamb, co-defendant, was acquitted, the corporate defendant could not be shown to have had the

necessary specific criminal intent or *mens rea.* The cases do not support this line of argument. *United States v. St. Louis Dairy Co., et al., supra; United States v. General Motors Corporation, et al., supra; American Medical Association v. United States, supra.*

The cases cited in appellant's brief on criminal intent do not support its position. In *Morissette v. United States,* 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288, (1952), the Supreme Court did hold that intent was an essential element under Section 641, Title 18, United States Code. The facts were that the defendant on a hunting trip picked up a few tons of used bomb casings which he later sold for $84.00 after flattening them and taking them to market. He said he had not intended to steal government property but readily admitted that he had taken the casings. The Supreme Court held that the question of intent was one which the trial court could not withdraw from the jury. This case gives no comfort to appellant since here the question of intent was decided by the jury.

In *Screws v. United States,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), defendants were indicted under 18 U.S.C. Section 88. The court held that under this section it was necessary to show a specific intent to deprive a person of a constitutional right—in that case the right not to be deprived of life without due process. Since the question of intent had not been submitted to the jury, the court reversed the conviction. Again the case is irrelevant since the question of criminal intent in the instant case was submitted to the jury.

Appellant next cites *Teller v. United States, supra.* In that case the defendant was charged with cutting timber from government land. The trial court instructed the jury that the intentional cutting of timber on lands known to be a part of the public domain constituted a violation of the law. On appeal the court affirmed and stated, in answer to defendant's attempt to show his "honest purpose" in cutting the timber:

> "In June, 1898, the defendant entered 160 acres, and four other persons each entered 160 acres of the same character of lands lying in the near vicinity to those upon Cottonwood creek now in question, for which defendant paid to the United States the price required by the stone and timber act, namely, $2.50 per acre, or a total of $2,400. Defendant's counsel contend that such purchase by him of similar lands and payment therefor at about the same time as is laid in the information is a circumstance which ought to have gone to the jury as evidence that he would not intentionally commit a trespass for the sake of obtaining timber of the same character a short distance away. We entirely fail to appreciate the force of this contention." (pp. 275-6)

The defendant in *Teller* also attempted to negate criminal intent by a showing that under local custom, it was common to cut timber from land before patent was obtained. The Court disposed of that argument as follows at page 276:

> "We entirely agree with the trial court that this evidence was incompetent. A general custom to violate the law cannot, on any principles of

morality or law, justify itself. Neither can it justify an individual instance of violation of the law . . ."

Appellant argues that "Before a man can be punished his case must be plainly and unmistakably within the statute" and cites the case of *United States v. Lacher,* 134 U.S. 624, 628, 10 S.Ct. 625, 33 L.Ed. 1080 (1889) in support thereof. However, in that case the court, after stating the principle, went on to say:

"But though penal laws are to be construed strictly, yet the intention of the Legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the Legislature." (Id. at p. 628)

The defendant in that case had contended that the offense with which he was charged was also covered by another section of the Criminal Code. To this the Court replied:

"The contention is that the embezzlement of a letter is punishable only under section 3891, whether it does or does not contain a thing of value; that if it does the offender is not liable under section 5467, unless he steals it; and that this is a reasonable and just construction, as the letter may have been taken without intention to abstract the article, and indeed without suspicion of the contents until the interior is explored. And it is urged that as section 146 of the Act of June 8, 1872, expressly provided a penalty for the embezzlement of a letter, 'which shall not contain' anything of value, and its substitute, section 3891, uses the language 'although it does not contain'

> anything of value, the latter section has been thereby broadened so as to punish the offense whether the letter contains an article of value or not. This view would require us to hold that the intention was to do away with the long-observed distinction between embezzling letters containing valuable matter and those which do not, and to absolve the culprit from liability for all the consequences of his unlawful act, notwithstanding the offenses of secreting, embezzling, or destroying letters of the first class are carefully defined. If section 3891 covers the embezzlement of all letters and mail matter, no reason for the larger part of section 5467 can be perceived. The construction contended for is inadmissible." (Id. at p. 632)

Appellant cites *Pevely Dairy Co. v. United States, supra,* for the proposition that a corporation cannot have an independent intent and that it is a mere creature of its individual officers. Said case has previously been discussed in Section I above.

That the corporation herein had an intent imputed to it from its agents or employees is indicated without contradiction in the record. There is no doubt that Ritchie and Wallace were hired to cut and remove timber from the Pecwan area which included the unsurveyed strip (Tr. 587, 863, 1369); that Lynn Colby was an employee of the appellant and acted for the interests of the appellant (Tr. 1497); that the workers in the woods were paid by Magnolia (Tr. 767, 1279-1280); that Lamb instructed Ritchie and Wallace to log throughout the unsurveyed area (Tr. 672, 870); that Mr. Ryerson pointed out the unsurveyed strip to

Ritchie and Lamb at the area in 1951, before the actual major logging began (Tr. 584); that the agents and employees of the appellant had and used a duplicate map of Plaintiff's Exhibit 27 which showed without doubt the unsurveyed area (Tr. 590, 591, 861-862, 1318, 1320, 1398, 1505, 1515-1516); that the agents of the appellant discussed the unsurveyed strip (Tr. 584, 861, 862, 1515-1516); that Ritchie directed the cutting in the unsurveyed area (Tr. 1345); that Belcher Abstract and Title Company of Eureka, Humboldt County, would not insure title of the unsurveyed land (Tr. 962, 1386); that the deed from Arrow Mills did not include the unsurveyed area (Tr. 1235); that Mr. Jameson of Arrow Mills knew of the unsurveyed strip from the Belcher Abstract and Title Company (Tr. 1115); that Arrow Mills did not warrant any title to the unsurveyed area (Tr. 988); that Mr. Lamb, Mr. Briggs, Mr. Ainsworth, Mr. Ritchie, and Mr. Wallace, all knew that unsurveyed land belongs to the United States (Plaintiff's Exhibit 29, Defendant's Exhibit U); that while the cutting of the timber and the taking of the logs was taking place in 1954, Mr. Lewis of the Cadastral Engineers of the Bureau of Land Management warned Mr. Wallace that the timber being cut was on government land (Tr. 385); and that Mr. Lamb told Mr. Wallace to keep cutting (Tr. 876). At least six of the plaintiff's exhibits, which were either known or could easily have been known by the co-defendant R. Drew Lamb or his attorneys, indicated without any doubt the existence of the unsurveyed area. See Plaintiff's Exhibits 8, 9, 18, 20, 22 and 27. With relevance herein the appellant fur-

ther substantiates its activities by stating that "During 1952, 1953 and 1954, logging operations in the general area were conducted by Magnolia Motor & Logging Co." (Appellant's Opening Brief, p. 4).

That the contention of the appellant herein is basically without merit is shown in the case of *United States v. George F. Fish, Inc., supra* at 801, wherein it is stated:

> "The corporate defendant makes a separate contention that the guilt of its salesman is not to be attributed to it. But the Supreme Court has long ago determined that the corporation may be held criminally liable for the acts of an agent within the scope of his employment, New York Cent. & H. R. R. Co. v. United States, 212 U.S. 481, 29 S.Ct. 304, 53 L.Ed. 613; and the state and lower federal courts have been consistent in their application of that doctrine. Zito v. United States, 7 Cir., 64 F.2d 772; C. I. T. Corp. v. United States, 9 Cir., 150 F.2d 85; Mininsohn v. United States, 3 Cir., 101 F.2d 477; Egan v. United States, 8 Cir., 137 F.2d 369, certiorari denied 320 U.S. 788, 64 S.Ct. 195, 88 L.Ed. 474; United States v. Arrow Packing Corp., 2 Cir., 153 F.2d 669. See also Director of Public Prosecutions v. Kent and Sussex Contractors, Ltd., [1944] 1 K.B. 146; Moore v. I. Bresler, Ltd., [1944] 2 All. E. R. 515, discussed in 19 Aust. L. J. 51; Chuter v. Freeth & Pocock, Ltd., [1911] 2 K.B. 832; the articles, Corporations and the Criminal Law, 11 Sol. 101; Criminal Liability of Corporations, 88 Sol. J. 97, 139; and the full discussion of corporate responsibility under the penalty provisions of the Act, Regan v. Kroger Grocery & Baking Co., 386 Ill. 284, 54 N. E. 2d 210, 219.

"No distinctions are made in these cases between officers and agents, or between persons holding positions involving varying degrees of responsibility. And this seems the only practical conclusion in any case, but particularly here, where the sales proscribed by the Act will almost invariably be performed by subordinate salesmen, rather than by corporate chiefs, and where the corporate hierarchy does not contemplate separate layers of official dignity, each with separate degrees of responsibility. The purpose of the Act is a deterrent one; and to deny the possibility of corporate responsibility for the acts of minor employees is to immunize the offender who really benefits, and open wide the door for evasion. Here Simon acted knowingly and deliberately and hence 'wilfully' within the meaning of the Act, Zimberg v. United States, 1 Cir., 142 F.2d 132, 137, 138, certiorari denied 323 U.S. 712, 65 S.Ct. 38, and his wilful act is also that of the corporation. United States v. Union Supply Co., 215 U.S. 50, 55, 30 S. Ct. 15, 54 L.Ed. 87; United States v. Illinois Cent. R. Co., 303 U.S. 239, 58 S.Ct. 533, 82 L.Ed. 773.

"Judgment affirmed."

The question of the corporation's criminal liability herein was based upon sufficient evidence to go to the jury. An appellate court will not weigh the facts and determine the guilt or innocence of an accused by a mere preponderance of the evidence, but will limit its decision to questions of law. *Burton v. United States,* 202 U.S. 344, 26 S.Ct. 688, 50 L.Ed. 1057 (1906); *Miles v. United States,* 103 U.S. 304, 26 L.Ed. 481 (1881); *Kramer v. United States,* (9th Cir., 1948)

166 F.2d 515. In addition, where there is a conflict in the evidence in the trial court, the reviewing court will accept that version which tends to support the verdict. *Evans v. United States,* (9th Cir., 1958) 257 F.2d 121.

Appellant contends (at pages 25-26 of its Opening Brief) that its logging in the hiatus area was "open and notorious, with no effort to conceal the activities being carried on." The evidence in the record does not support this argument. When Magnolia was operating on its own property in the Pecwan Tract, there was no effort to conceal its activities. However, when it began cutting in the unsurveyed area the situation changed radically. No trespassing signs were erected (Tr. 770-771). Licensed surveyors, who are uniformly accorded the courtesy of right of way through property, were refused admittance (Tr. 822). Even the government surveyors were treated as trespassers by the agents of the company. R. Drew Lamb ordered Wallace to run the United States surveyors off the unsurveyed area (Tr. 874, 875). Further, the gravity of the situation is indicated by the fact that when Wallace did not receive any document protecting him in cutting on the unsurveyed strip, he ceased to cut and terminated his business relationship with the appellant (Tr. 881).

Relative to appellant's attempt to mitigate its culpability for its acts by reliance upon alleged investigations and advice of counsel, it is submitted, first, that the cases cited by appellant from page 21 to page 26 of its Opening Brief do not support this conten-

tion, and second, that such advice or reliance is not a defense to a criminal charge. As stated above at pages 10, 25 of Appellee's Brief, there was substantial evidence of the existence of the unsurveyed strip of government land of which the appellant's counsel and its other agents were fully aware. The issue of criminal intent, including all the arguments of the appellant here made, was submitted to the jury and the jury returned a verdict of guilty.

V.

THE DISTRICT COURT'S INSTRUCTION THAT THE LAND NOW KNOWN AS TOWNSHIP 11½ NORTH, RANGE 3 EAST, HUMBOLDT BASE AND MERIDIAN, IS AND WAS THE PROPERTY OF THE UNITED STATES DURING THE PERIODS OF TIME CHARGED IN THE INDICTMENT WAS PROPER.

The court gave plaintiff's instruction number 15, which is set out as follows, to-wit:

> "You are instructed that the land now known as Township Eleven and one-half North, Range Three East, Humboldt Base and Meridian, is and was the property of the United States during the periods of time charged in the indictment."

The appellant makes the contention that the giving of this instruction was prejudicial error and that the Court invaded the province of the jury by taking from the jury what the appellant calls a question of fact. The appellant submits that the giving of this instruction caused an *ex post facto* application under the statutes.

In order to have an *ex post facto* situation certain conditions must be present. The essence of the *ex post facto* clause in Article One, Section 9, Clause 3 of the Constitution of the United States is that every law which makes criminal an act which was innocent when done, or which inflicts a greater punishment than the law annexed to the crime when committed is an *ex post facto* law. The criteria are, as stated by Justice Chase in *Calder v. Bull,* 3 Dall. 386, 390, 1 L. Ed. 648 (1798):

> "1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender."

It is submitted, therefore, that under the above-mentioned criteria the facts in the case at bar clearly do not fall within the prohibition of the Constitution.

At page 27 of its Opening Brief the appellant states: "A survey of public land does not ascertain the boundaries of the land. *It creates them.*" The appellee does not take issue with the appellant's statement of the law. But the appellant overlooks the fact that "unsurveyed land" is part of the public lands belonging to the United States and regardless of when

boundaries are determined the land itself was always there. *Teller v. United States, supra.*

Further, it is a matter of common judicial practice for the trial court to take judicial notice of public laws. By the Treaty of Guadalupe Hidalgo, 9 Stat. 922, the Republic of Mexico ceded to the United States of America all lands within the territorial limits of California. As stated in *Standard Oil Company of California v. Johnson,* (1938) 76 P.2d 1184, 1186, 10 C.2d 758:

> "On February 2, 1848, 9 Stat. 922, by the Treaty of Guadalupe Hidalgo, the Republic of Mexico ceded to the United States government all the lands within the territorial limits of California. The United States thereby became vested with the title to all such lands not held in private ownership. Thompson v. Doaksum, 68 Cal. 593, 596, 10 P. 199 . . ."

See also *F. A. Hihn Co. v. City of Santa Cruz* (1915) 150 Pac. 62, 170 Cal. 436, 443. On the cession of California to the United States, all the public lands therein became the property of the United States. *Friedman v. Goodwin,* (C.C. 1856) Fed. Cas. No. 5,119, 1 McAll. 142. It is submitted, therefore, that the District Court could take judicial notice that the unsurveyed area in the case at bar belonged to the United States and could give such an instruction to the jury as a matter of law.

Appellant, at pages 29 to 34 of its Opening Brief, is concerned with surveys of the boundaries of the respective townships. There is nothing therein that

necessitates discussion which has not been previously distinguished above. With particular reference to the argument that Defendant's Exhibit H for Identification was improperly excluded as evidence, it is sufficient to note that said document was refused admission on the proper ground that it was hearsay and irrelevant.

It is further submitted that the appellant corporation waived its right under Rule 30 of the Federal Rules of Criminal Procedure to object to the instruction by the District Court that the "unsurveyed area" was property of the United States. Rule 30 of the Federal Rules of Criminal Procedure, with application to the instant case, states in part:

> ". . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

As a general rule, in the absence of a request to charge or an objection to the charge given, the appellate court will not consider specifications of error based upon the trial court's instruction to the jury. *Nordgren v. United States,* (9th Cir., 1950) 181 F.2d 718, 722; *Nemec v. United States,* (9th Cir., 1949) 178 F.2d 656, 661, cert. den., 339 U.S. 985, 70 S.Ct. 1006, 94 L.Ed. 1388; *O'Connor v. United States,* (9th Cir., 1949) 175 F.2d 477; *Ziegler v. United States,* (9th

Cir., 1949) 174 F.2d 439, cert. den. 338 U.S. 822, 70 S.Ct. 68, 94 L.Ed. 499; *Shockley v. United States,* (9th Cir., 1949) 166 F.2d 704, cert. den. 334 U.S. 850, 68 S.Ct. 1502, 92 L.Ed. 1773; *Fredrick v. United States,* (9th Cir., 1947) 163 F.2d 536, 549, cert. den. 332 U.S. 775, 68 S.Ct. 87, 92 L.Ed. 360.

An objection to a requested instruction of another party before the charge is given is not sufficient as an objection to the charge. *Ziegler v. United States, supra* at 448. In the case at bar, the District Court considered in chambers and out of the presence of the jury the instructions requested by the respective parties (Tr. 116-151). The Court after giving the instructions to the jury asked the respective counsel whether there were any objection to the instructions as given. No objection as to this instant instruction pertaining to Township 11½ was then made by appellant's counsel. Therefore, it is submitted that as to this particular instruction objection thereto has been waived pursuant to the mandate of Rule 30.

CONCLUSION.

Wherefore, it is respectfully submitted that the verdict of the jury below is amply supported by evidence and that the judgment herein should be affirmed.

Dated, Sacramento, California,
November 17, 1958.

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